Ricci v. DeStefano: The Practical Implications for Employers  
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The U.S. Supreme Court’s recent decision in *Ricci v. DeStefano*, involving a challenge to the City of New Haven’s refusal to certify the results of a firefighters’ promotional exam, has garnered enormous attention in the popular press. While debate continues concerning the correctness and implications of the Court’s decision, employers should be aware of how the decision impacts on their own employment practices.

The *Ricci* case highlights potential conflicts that can arise under Title VII of the Civil Rights Act of 1964 between the statute’s two different theories of discrimination -- “disparate treatment” and “disparate impact.” Disparate treatment discrimination occurs when an individual is subjected to intentional discrimination because of his race or other protected characteristic. Disparate impact discrimination claims, on the other hand, can arise when a facially-neutral practice, such as an examination, adopted without discriminatory intent, has a disproportionately adverse effect on minorities. When an employer’s neutral practice is shown to have a disparate impact, the employer will be in violation of Title VII unless it can demonstrate that the challenged practice was job-related and consistent with business necessity, and that there was no available alternative that would result in less of a disparate impact.

The *Ricci* case arose from a 2003 promotional examination taken by 118 New Haven firefighters, on which white candidates significantly outperformed minority candidates. New Haven refused to certify the results of the exam out of concern that it would prompt a disparate impact lawsuit by minority firefighters. White and Hispanic firefighters who likely would have been promoted had the results been certified then sued New Haven claiming that they had been denied promotional opportunities because of their race, in violation of Title VII. The Supreme Court found that New Haven violated Title VII’s disparate treatment prohibition in failing to certify the test results. New Haven’s rejection of the test results was unlawful, the Court found, because there was no “strong basis in evidence” for believing that the minority firefighters would have prevailed on a disparate impact claim. Notably, New Haven had taken extensive steps to ensure the validity of the test before it was administered, including hiring a consultant to develop and administer the exam at a cost of $100,000.

It is important to note that *Ricci* does not change the legal standard for claims of disparate-impact discrimination. However, the decision addresses the situation in which many employers find themselves when they observe a disparate impact of a facially-neutral employment practice and grapple with how to address it. New Haven, for example, was faced with a choice between certifying the test results and risking a disparate impact lawsuit by minority firefighters, or rejecting the results and risking a disparate treatment claim by non-minorities. The *Ricci* decision highlights the importance of employers putting forth the necessary effort upfront in developing employment procedures and
selection criteria that ensure employment practices are fully vetted under Title VII’s standards prior to their use. Specifically, if an employer adopts a facially-neutral practice or standard that is job-related and in accordance with business necessity, and where no alternative practice with less disparate impact was available, the employer can be more confident in acting upon the results, even if they are disproportionately adverse to minorities. Indeed, as the result in Ricci shows, Title VII requires that the employer do so.